ORISSA HIGH COURT
CUTTACK

CRIMINAL APPEAL NO. 237 OF 1989

From the judgment dated 18.08.1988 passed by Sri L.N.Patnaik, J.M.S.C., Berhampur in 3 (a) C.C. No.273 of 1986 (T.R. No.3170 of 1986).

Executive Officer, Berhampur Municipality ..... Appellant

Versus

Manasi Sahoo ..... Respondent

For Appellant - M/s A.K.Choudhury, K.K.Das and C.K.Behera

For Respondent - Mr. S.D.Das, S.K.Samantray And G.S.Sabat

PRESENT:-

THE HON'BLE MR. JUSTICE PRADIP MOHANTY

Date of hearing & judgment : 12.07.2006

PRADIP MOHANTY, J. The appellant has preferred this appeal against the judgment and order of acquittal dated 18.08.1988 passed by the J.M.S.C., Berhampur in 3(a) C.C. No.273 of 1986 (T.R. No.3170 of 1986).

2. The case of the prosecution, in short, is that on21.12.1985 during the visit of the Municipal Amin (P.W.1), it was found that the accused-respondent was constructing a new house

obstructing the public road. It is alleged that the accused-respondent was making the said construction without obtaining prior permission of the appellant. As such, she contravened Sections 264 and 266 of the Orissa Municipal Act, 1950 (hereinafter referred to as 'the Act'). A prosecution report against the accused-respondent was filed before the S.D.J.M., Berhampur which was registered as 3 (a) C.C. No.273 of 1986.

3. The defence plea was one of stout denial.

4. To substantiate the accusation, prosecution examined two witnesses and exhibited six documents. P.W.1 is the Amin and P.W.2 is the Town Surveyor of Berhampur Municipality. Defence examined none. The J.M.S.C., Berhampur, who tried the case, by his judgment dated 18.08.1988 acquitted the accused-respondent of the charges with a finding that the prosecution has failed to prove the ingredients of the above offences.

5. Mr. Choudhury, learned counsel for the appellant, submits that the trial court grossly fell into error in disbelieving the visit of P.W.1 to the spot on the ground that P.W.1 had not ascertained the ownership of the building in question. He further submitted that the trial court has committed an error in holding that the show-cause notice was not served on the accused-respondent.

6. Now, let us notice some of the provisions of the Act, which are relevant for the present purpose. Section 273A runs thus:-

> **"273-A. Demolition or alteration of building work unlawfully commenced, carried on or completed-** (1) If the Executive Officer is satisfied –
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> (i) that the construction or reconstruction of any building or well –
>
> (a) has been commenced without obtaining the permission of the

Executive Officer or where an appeal has been preferred to the Municipality in contravention of any order passed by the Municipality in appeal; or

(b) is being carried on, or has been completed otherwise than in accordance with the plans or particulars on which such permission or order was based; or

(c) is being carried on, or has been completed in breach of any of the provisions of this Act or of any rule or bye-law made under this Act or of any direction or requisition lawfully given or made under this Act or such rules or bye-laws; or

(ii) that any alteration required by any notice issued under Section 271 have not been duly made; or

(iii) that any alteration of or addition to any building or any other work made or done for any purposes in, to or upon any building, has been commenced or is being carried on or has been completed in breach of Section 273, he may make a provisional order requiring the owner or the builder to demolish the work done, or so much of it as, in the opinion of the Executive Officer, has been lawfully executed or to make such alteration may in the opinion of the Executive Officer be necessary to bring the work into conformity with the Act, bye-laws, rules direction or requisition as aforesaid, or with the plans and particulars on which such permission or order was based, and may also direct that until the said order is complied with the owner or builder shall refrain from proceeding with the building or well.

> (2) The Executive Officer shall serve a copy of the provisional order made under Sub-section (1) on the owner of the building or well together with a notice requiring him to show cause within a reasonable time to be mentioned in such notice why the order shall not be confirmed.
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> (3) If the owner fails to show cause to the satisfaction of the Executive Officer, the Executive Officer may confirm the order with any modification he may think fit to make, and such order shall then be binding on the owner."

As per the above provision, notice should be served on the owner of the building. Section 347 of the Act provides as follows:-

> "**347. Persons empowered to prosecute -** Save as otherwise expressly provided in this Act, no person shall be tried for any offence against the provisions of this Act, or of any rule, regulation or bye-law made under it, unless a complaint is made by the police or the Executive Officer of a Municipality or by a person expressly authorized in this behalf by the Municipality or its Executive Officer, within three months of the commission of the offence. But nothing herein shall effect the provisions of the Code of Criminal Procedure, 1898 (Act 5 of 1898) in regard to the power of certain Magistrate to take cognizance of offences upon information received or upon their own knowledge or suspicion.

The above provision speaks of filing of prosecution report within three months from the date of construction. In the instant case, there is no material before this Court to show that the notice as required by Section 273A of the Act was served on the owner of the building. Therefore, it can be inferred that no notice has been served on the owner of the building, and as such, there has been non-compliance of Section 273A of the Act. It is not open to the prosecution to file a case under Section 385A of the Act without complying with the provisions of Section 273A. Perusal of the Amin's report shows that

there is no mention about the date of construction of the building. Therefore, it cannot be inferred that the prosecution report was filed within three months from the date of construction. Moreover, no independent witness has been examined by the prosecution in this case and no explanation whatsoever is forthcoming for non-examination of material witnesses.

8. In view of the above, there is no infirmity in the impugned judgment and order of acquittal. Therefore, the appeal stands dismissed.

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PRADIP MOHANTY,J.

High Court of Orissa, Cuttack,
The 12th July, 2006/***Samal***